No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
R. M. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Acknowledging the importance of this case, respondent agrees that it presents the question whether the NCAA is subject to Title IX simply because the NCAA "receives dues from its members which receive federal funds." Opp. i, 4. Respondent—joined in her efforts by the National Women's Law Center—does not dispute that this case has enormous practical implications for the NCAA, as well as for similar organizations. *See* Pet. 22-24. And respondent defends the Third Circuit rationale without giving an inch of ground, acknowledging that it extends to the threshold coverage determination under "analogous statutes," such as Section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964. Opp. 3; note 2, *infra*.[1]

[1] The importance of this case has not escaped the attention of non-parties either. *See, e.g.*, Brian Landman, *NCAA: On Shaky*

2. In seeking to avoid plenary review, respondent instead asserts the absence of a conflict, arguing that this case is "entirely distinguishable from * * * *Paralyzed Veterans*." Opp. 5. This assertion is utterly belied by *Paralyzed Veterans* and this Court's subsequent decisions.[2]

a. Respondent first claims that the fact that "the NCAA actually receives money from its federally funded member institutions in the form of dues" "alone distinguishes this case from *Paralyzed Veterans*," because the airlines in *Paralyzed Veterans* indirectly benefited from federal assistance only in the form of " 'nonmoney grants.' " Opp. 5-6 (quoting *Paralyzed Veterans*, 477 U.S. at 606). But *Paralyzed Veterans* itself negates that distinction; the Court specifically recognized that "federal financial assistance may take nonmoney form." 477 U.S. at 607-608 n.11. Thus, the touchstone in determining whether federal coverage applies is not whether the entity indirectly benefits in the form of money *or* nonmoney assistance, but rather—as the *Paralyzed Veterans* Court made clear in

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Ground?, St. Petersburg Times, July 19, 1998, at 1C ("On March 16, a U.S. appellate court held that since NCAA member institutions receive federal funding, the NCAA itself is subject to Title IX. That ruling could lead to lawsuits over the number of scholarships offered per sport and the money spent on various championship events."); Jack Carey *et al.*, *NCAA Strains Under Weight of College Sports*, Salt Lake Trib., July 2, 1998, at D3 (discussing same); Jack Carey *et al.*, *Patching Up the NCAA Organization*, USA Today, June 30, 1998, at 1C ("If the ruling [in this case] stands, it could prompt suits against the NCAA over such issues as the number of scholarships per sport."); Mark Asher *et al.*, *Lawsuits Against the NCAA May Alter College Sports*, Ariz. Republic, May 13, 1998, at C5 (discussing same).

[2] While respondent attempts to distinguish *Paralyzed Veterans* based on certain facts, she does not dispute that the Court's interpretation in *Paralyzed Veterans* of the federal funding trigger in Section 504 controls for purposes of interpreting the identical trigger contained in Title IX and the other program-specific statutes. *See* Pet. 2 & n.1. Indeed, respondent impliedly acknowledges that "Title IX, Section 504, and Title VI * * * should be interpreted in the same manner." Opp. 10-11.

distinguishing *Grove City College* v. *Bell*, 465 U.S. 555 (1984)—whether the indirect beneficiary is an "intended recipient" of the aid. 477 U.S. at 607; *see id.* at 608 n.11.

In *Paralyzed Veterans* it was "clear that the [intended] recipients of the federal assistance extended by Congress under the [Airport] Trust Fund are the airport operators." *Id.* at 608. Thus, federal coverage stopped with the operators; it did not "follow[] the aid past the [operators] to those who merely benefit from the aid." *Id.* Here, it is clear that the intended recipients of the federal assistance extended by Congress are the colleges and universities. *See* Pet. 4 & n.2. Thus, federal coverage stops with those institutions; it does not follow the aid past them to the NCAA, which if it indirectly benefits from the aid at all does so only because the institutions have decided to pay nominal membership dues. Indeed, in this case as in *Paralyzed Veterans* there is no claim that *Congress* actually "intended [the alleged indirect beneficiary] to receive [the] money." 477 U.S. at 607. The Third Circuit consciously disregarded this reasoning, *see* Pet. App. 15a ("Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX"), leading it to reach a result in direct conflict with *Paralyzed Veterans*.

This direct conflict warrants plenary review. As this Court recognized in *Paralyzed Veterans*, extending federal coverage beyond intended recipients to those who merely indirectly benefit from federal aid—either money or nonmoney—would have two unacceptable consequences. First, it would give the program-specific statutes "almost limitless coverage." *Id.* at 608. Second, it would undermine the contractual framework on which those statutes are based. *Id.* at 605-606. As we explained in our petition (p. 10 n.6), and respondent does not dispute, this Court's subsequent decisions—including its decision last Term in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998)—underscore the importance of the contractual underpinning of Title IX liability.

The Third Circuit decision all but eliminates that underpinning, extending the program-specific statutes to virtually every individual and entity that receives money from an entity that receives federal funds. Congress plainly did not intend that result.

Perhaps recognizing this, respondent now suggests (Opp. 6) that the NCAA is a *direct* federal funding recipient. This is a red herring; the NCAA receives none of the federal funds disbursed to the separate National Youth Sports Program. Respondent did not point to this program as a basis for subjecting the NCAA to Title IX below, and, as respondent herself acknowledges, "the Third Circuit did not rule on this argument." Opp. 6.[3] Instead, "the Third Circuit held that if, as Smith alleged in her complaint, the NCAA receives dues from its members which receive federal funds, the NCAA would be subject to the requirements of Title IX." *Id.* 4; *see* Pet. 6-7. That ruling clearly conflicts with *Paralyzed Veterans*, already has led to perverse results in other cases, and disposes of the coverage determination in this case. *See infra* at 8. It should not be permitted to stand based on an

[3] Respondent's *amici* referred in passing to this theory in a footnote to its *amicus* brief in the Court of Appeals, but it is settled that a court will "consider only issues argued in the briefs filed by the *parties* and not those argued in the briefs filed by interested nonparties." *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir.) (emphasis added), *cert. denied*, 516 U.S. 916 (1995). And, of course, parties may not dodge plenary review by seeking to introduce new legal theories in this Court, especially when, as here, it is undisputed that the new theory was neither advanced by the parties nor passed upon below. *See Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 522-523 (1991) (refusing to consider argument "raised * * * for the first time in [party's] brief in opposition to the petition for writ of certiorari"); *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("alternative ground * * * does not prevent us from reviewing the ground exclusively relied upon by the courts below"); *see also Wilson* v. *Arkansas*, 514 U.S. 927, 937 n.4 (1995); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 725-726 (1989); *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985).

eleventh-hour suggestion that the NCAA may be subject to Title IX on an alternative basis never raised by respondent, or passed upon by the courts below.

b. In attempting to explain away the clear conflict between the Third Circuit decision and *Paralyzed Veterans*, respondent also argues that "[t]here is no real distinction between the NCAA and its member institutions." Opp. 9; *see id.* 7-10. The notion that the NCAA is merely a "surrogate" (Opp. 7) for its members is unfounded as a practical matter, especially when it comes to the non-athletic activities with respect to which all or virtually all of the federal funding received by member institutions is allocated. *See* Pet. 21-22 n.13.[4] Indeed, in *NCAA* v. *Tarkanian*, 488 U.S. 179, 190 (1988) (quotation omitted), this Court reversed a lower court decision holding that the NCAA is a state actor based in part on a similar premise—*i.e.*, that because " 'many NCAA mem-

[4] Respondent claims that our reliance on *NCAA* v. *Califano*, 444 F. Supp. 425 (D. Kan. 1978), *rev'd on other grounds*, 622 F.2d 1382 (10th Cir. 1980), is "misleading" because at the time the case was decided the NCAA allegedly had an interest only in promoting men's athletics. Opp. 12-13 n.6. But the court's findings on the divergence in interests between the NCAA and its members was not limited to the promotion of men's versus women's sports. Indeed, the court spoke in broad terms, recognizing that "the NCAA does not (for good cause) purport to speak generally for post-secondary institutions of higher education on such all-encompassing matters of general administrative concern as curriculum and budget planning, academic freedom, internal governance, and so forth. The NCAA's interests are therefore *not* coterminous with or identical to the broader interests of all or any of its institutional members." 444 F. Supp. at 433 (emphasis added). Moreover, as the court also noted, "however worthy the aims and programs of the NCAA may be within its proper sphere, some might view the purposes of the NCAA as *inimical* to legitimate overall interests and objectives of particular educational institutions." *Id.* (emphasis added). That is scarcely what one would expect to find from the type of surrogate relationship hypothesized by respondent.

ber institutions were either public or government supported,' " the NCAA itself must be a public entity.[5]

Moreover, in *Paralyzed Veterans* this Court squarely rejected the argument—reinvented by respondent here—that an entity which is not itself an actual or intended federal funding recipient may become one by virtue of the fact that it is " 'inextricably intertwined' with an institution that [is]." 477 U.S. at 610. *See Dunlap* v. *Association of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) (entities "that are 'inextricably intertwined' with actual recipients, are *not* on that basis covered") (citing *Paralyzed Veterans*, 477 U.S. at 607-610; emphasis added). Compelling institutional considerations support this rule. As this Court has recognized, threshold jurisdictional determinations—such as whether the program-specific statutes apply to a particular individual or entity—should not be subjected to fact-driven inquiries that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal." *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Respondent's "surrogate" approach for determining when federal coverage applies suffers from each of these flaws.

Respondent's approach also departs from the contractual framework established by Congress in enacting Title IX and the other program-specific statutes, and emphasized by this Court in interpreting these statutes, which

[5] The NCAA constitution, moreover, draws clear lines between the association and its members. Thus, for example, while the constitution authorizes the NCAA to adopt legislation governing intercollegiate athletics, NCAA const. art. 5, it provides that "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself." *Id.* art. 6.01.1. In addition, we note that, as respondent herself recognizes (Opp. 10 n.5), existing law would prevent public colleges and universities from attempting to use the NCAA as a vehicle to shirk their Title IX obligations.

was intended to predicate federal regulatory coverage on "the recipient's acceptance of the funds." *Paralyzed Veterans*, 477 U.S. at 605. The contractual analysis has the salutary effect of providing "the receiving entity of federal funds * * * notice" that it is covered. *Gebser*, 118 S. Ct. at 1998 (quotation omitted). Furthermore, it makes coverage dependent on the legal determination whether the entity was an intended recipient under the particular grant statute in question, rather than the factually intensive and unpredictable determination whether the entity is sufficiently "interrelated" with a federal funding recipient to be subsumed by federal coverage.

3. While respondent understandably devotes the bulk of her brief to attempting to obscure the direct conflict with *Paralyzed Veterans*, she also briefly attempts to refute the circuit conflicts created by the decision below. *See* Opp. 10-12. This effort is itself telling. Indeed, respondent candidly acknowledges that if "the Third Circuit decision in this case conflicts with the holding in *Paralyzed Veterans*," then the Third Circuit decision also conflicts with the numerous decisions from other circuits that have faithfully limited the reach of the program specific statutes to actual and intended recipients of federal assistance. Opp. 11; *see* Pet. 16-18 (discussing cases). Thus, because the Third Circuit decision *does* conflict with *Paralyzed Veterans*, respondent has no basis for distinguishing these decisions. This circuit conflict underscores the need for this Court's review.[6]

[6] Respondent says there is no conflict between the Third Circuit decision below and the circuit decisions involving the third-party liability of actual federal funding recipients. *See* Opp. 11-12. But she acknowledges that these cases speak directly to "Title IX's contractual nature," *id.* 11, which—as we have explained (Pet. 18-20)—is the basis on which they plainly conflict with the decision below. Respondent also fails in attempting to obscure the conflict between the decision below and *Califano*, which held that the NCAA lacked standing to challenge the Title IX regulations on its own behalf. The simple reason that the courts in *Califano* held that the NCAA

4. The decision below not only flies in the face of precedent, but has already led to perverse results. In *Kemether* v. *Pennsylvania Interscholastic Athletic Ass'n*, No. Civ. A. 96-6986, 1998 WL 464921 (E.D. Pa. Aug. 6, 1998), for example, the court—following the Third Circuit decision in this case—held that a state high school athletic association was subject to Title IX based primarily on the fact that the association "is funded in part by dues from its member schools, most of which are public schools" that receive federal assistance. *Id.* at *29. In so holding, the court specifically rejected the association's argument that it was not subject to Title IX because the Office of Civil Rights had "determined that [it] was *not* a recipient of federal assistance under § 504 of the Rehabilitation Act, which defines 'recipient' in terms materially identical to those of Title IX." *Id.* at *29 n.16 (emphasis added). As the court put it, this argument—not to mention the "agency's legal conclusion" that the association was *not* a covered recipient— was "fatally undermined by the Third Circuit's subsequent decision in *Smith*." *Id.*

In other words, under the Third Circuit decision below, the agency's *own* determination that an entity is not a covered federal funding recipient may be disregarded. That fact alone speaks volumes about how far the Third Circuit has strayed from *Paralyzed Veterans*. This Court

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lacked such standing is that no one believed that Title IX applied to the NCAA. *See* Pet. 20. The Third Circuit decision below turns that heretofore settled understanding upside down, subjecting the NCAA to Title IX and the other program-specific statutes despite the absence of any indication whatsoever that Congress intended these statutes to reach the NCAA or similar indirect beneficiaries of federal aid. Finally, respondent claims that the decision below is "consistent with" *Horner* v. *Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994). Opp. 2-3. As we have explained (Pet. 20-21), that is not so. But to the extent that *Horner* supports the Third Circuit ruling below, it simply heightens the need for this Court to clarify that it meant what it said in *Paralyzed Veterans*.

should grant certiorari and reverse the far-reaching decision below.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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